No. 98-436

In The

Supreme Court of the United States

October Term, 1998

JOHN ALDEN, *et al.*,

Petitioners,

v.

STATE OF MAINE,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION

ANDREW KETTERER
Maine Attorney General

PETER J. BRANN
State Solicitor
(*Counsel of Record*)

Six State House Station
Augusta, Maine 04333
(207) 626-8800

Attorneys for Respondent

PAUL STERN
Deputy Attorney General

Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Notwithstanding the tenth amendment, the eleventh amendment, and the general principles of State sovereign immunity, does Congress have the power under the Commerce Clause to abrogate State sovereign immunity in state court when it lacks the power to abrogate such State sovereign immunity in federal court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

MISCELLANEOUS

RESPONDENT'S BRIEF IN OPPOS!TION

The respondent, State of Maine ("Maine"), respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision and judgment of the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"), issued on August 4, 1998, reproduced in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at Pet. App. 1a-13a, and reported in *Alden v. State*, 715 A.2d 172 (Me. 1998).

STATEMENT OF THE CASE

The present case, which comes to the Court from the Maine Supreme Judicial Court, is substantially the same as an earlier case that was brought in the United States District Court and was dismissed following *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Federal Court Suit. On December 21, 1992, the petitioners, 72 current and former probation officers, along with 24 other probation officers, filed suit in United States District Court against Maine, alleging that Maine had not properly paid them overtime pursuant to section 7 of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 207. Maine considered the petitioners professionals exempt under the FLSA, and, pursuant to a collective bargaining agreement, paid them a 16% non-standard premium in lieu of overtime. In addition to disputing the petitioners' claims, Maine asserted affirmative defenses based, *inter alia*, on sovereign immunity, the tenth amendment, and the eleventh amendment.

Subsequently, the District Court held that the plaintiffs were not entirely exempt from the overtime requirements of the FLSA, but were partially exempt as law enforcement officers. *Mills v. Maine*, 839 F. Supp. 3 (D. Me. 1993). The District Court then determined the method of calculating the overtime owed to the plaintiffs. *Mills v. Maine*, 853 F. Supp. 551 (D. Me. 1994).

Because the petitioners could receive under the collective bargaining agreement either the 16% non-standard premium in lieu of overtime *or* overtime, but not both, following the District Court's decision, beginning on February 6, 1994, Maine began to pay the petitioners overtime, which has continued to this day.[1] Pet. App. 15a-16a. The petitioners do not – and cannot – allege that there is any on-going violation of the FLSA. Thus, this case involves solely a claim for retroactive monetary relief directly against the State, *i.e.*, a claim for back pay for the period from December 21, 1989, to February 6, 1994. Pet. App. 16a.

---

[1] This case underscores the hazards of attempting to shoehorn the traditional and essential functions of government into the rigid requirements of statutes such as the FLSA that were enacted to regulate private enterprise. Because the petitioners do not work very much overtime, most of the petitioners earned less money when Maine began paying them overtime instead of the 16% non-standard premium in lieu of overtime. The petitioners then sued Maine and five state officials for retaliation under section 15(a)(3) of the FLSA, 29 U.S.C. § 215(a)(3). This claim was rejected by the District Court and by the First Circuit. *Blackie v. Maine*, 888 F. Supp. 203 (D. Me. 1995), *aff'd*, 75 F.3d 716 (1st Cir. 1996). Thus, even if their damage claims had not been barred, the petitioners would have achieved, at best, a Pyrrhic victory in this litigation.

Meanwhile, Maine proposed to calculate the overtime based on the attested time records the plaintiffs signed and submitted each week (reserving its appeal rights on the underlying liability decision). Virtually all of the petitioners chose to contest the accuracy of their time records, and the District Court appointed a special master to calculate the overtime. Following extensive proceedings, the special master issued tentative rulings, largely rejecting the petitioners' claims.

While the parties' objections to the special master's report were pending, this Court decided *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Based on that decision, Maine moved to dismiss the federal lawsuit for lack of subject matter jurisdiction on sovereign immunity grounds. The District Court dismissed the suit, which was affirmed on appeal by the First Circuit. *Mills v. Maine*, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997). The petitioners did not seek review of that decision in this Court, and thus the petitioners concede that Congress lacked the authority to abrogate State sovereign immunity in federal court pursuant to the eleventh amendment when it exercised its powers under the Commerce Clause to enact the Fair Labor Standards Act.

State Court Suit. Following dismissal of their federal court suit, on July 31, 1996, the petitioners filed the present suit against Maine in the Maine Superior Court, seeking damages for past alleged FLSA violations. Once again, in addition to disputing the petitioners' claims on the merits, Maine asserted an affirmative defense based on sovereign immunity. *See* Appendix to Appellants' Brief at A21. The petitioners sought to strike this defense, and

Maine sought judgment on the pleadings.[2] On July 18, 1997, the Superior Court granted judgment on the pleadings to Maine. Pet. App. 14a-24a.

> Simply put, if a plaintiff can't seek damages against the state for violations of federal law in federal court, the plaintiff can't seek damages in state court either.

Pet. App. 20a.

The petitioners then appealed to the Law Court. Over a dissent, on August 4, 1998, the Law Court affirmed dismissal of the petitioners' claims. Pet. App. 1a-13a. The court rejected the anomalous result advocated by the petitioners, namely, that the only forum for enforcement of a federal statute was state court:

> The postulate at work here, state sovereign immunity, is a "background principle" that is "embodied in the Eleventh Amendment." [*Seminole Tribe v. Florida*,] 517 U.S. at 72. Thus, the Eleventh Amendment does not delimit the scope and effect of state sovereign immunity. Rather, it reflects but one aspect of the states' inherent, more sweeping immunity from suits brought by private parties. A power so basic and profound would be an odd power indeed if it protected the states from suit in federal courts but provided no comparable protection in their own courts. If Congress does not have the power to abrogate state sovereign immunity with respect to federal causes of action brought in federal courts, as the Seminole Tribe case clearly held, then that limitation on congressional power may not be circumvented simply by moving to a state court. Accordingly, we conclude that sovereign immunity protects the State from defending this federal cause of action in its own courts.

Pet. App. 6a. In so holding, the Law Court relied on numerous prior decisions in which it had construed State sovereign immunity as congruent with eleventh amendment immunity. *See* Pet. App. 3a-4a (collecting cases). The Law Court also rejected the petitioners' new argument on appeal that Maine had waived its sovereign immunity based on its conclusion that the Maine Legislature had enacted statutes that expressly exempt the State from overtime suits. Pet. App. 6a-7a (citing Me. Rev. Stat. Ann., tit. 26, §§ 663(10), 664(3) (1988 & Supp. 1997)).

REASONS FOR DENYING THE WRIT

I. THE COURT SHOULD DENY THE WRIT TO REVIEW THE SOVEREIGN IMMUNITY CLAIM SO THAT THIS ISSUE CAN PERCOLATE IN THE STATE COURTS.

The petitioners' principal argument is that the Court should resolve the issue whether Congress has the power to abrogate State sovereign immunity in state court in cases in which Congress lacks the power to abrogate such State sovereign immunity in federal court because there is an intolerable conflict in the lower courts. *See* Petition

---

[2] The parties also litigated Maine's affirmative defense based on the statute of limitations. As noted above, there were no on-going alleged FLSA violations, and the petitioners were only seeking damages for alleged violations that had occurred over two years before the state court suit was filed. The Superior Court rejected this defense, Pet. App. 16a-18a, and Maine did not pursue this issue on appeal.

for a Writ of Certiorari ("Petition") at 5-14. The Court, however, should deny the writ because the petitioners have overstated the conflict and understated the complexity of the issue. *See, e.g., Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari) ("Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study.").

The petitioners contend that the Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), has created a "wave of litigation," *see* Petition at 7, thereby suggesting that it is a new issue whether States which are immune from suit in federal court under the eleventh amendment are also immune from suit in state court. First, the petitioners have ignored 40 years of constitutional litigation in state court prior to *Seminole Tribe* in which the decision below is simply the latest ripple. Second, the petitioners' "wave of litigation" following *Seminole Tribe* consists of only one state court of last resort, and the Court should defer consideration of this matter until state courts have had an adequate opportunity to consider this complex issue further.

A. The Decision Below Continued A Long Tradition Of Relying Upon Eleventh Amendment Jurisprudence To Determine Whether States That Are Immune In Federal Court Are Also Immune In State Court.

State courts have long relied upon the Court's eleventh amendment jurisprudence to determine whether

States are immune from suit under federal law in state court because "blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.' " *Seminole Tribe*, 517 U.S. at 69 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 326 (1934); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). Indeed, the eleventh amendment "stand[s] not so much for what it says, but for the presupposition * * * which it confirms." *Seminole Tribe*, 517 U.S. at 54 (ellipsis added by Court) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)) (quoted in decision below, Pet. App. 3a).

> That presupposition [of State sovereign immunity], first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that " '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.' "

Seminole Tribe, 517 U.S. at 54 (emphasis deleted by the Court) (quoting *Hans v. Louisiana*, 134 U.S. at 13; The Federalist No. 81, at 487 (A. Hamilton) (C. Rossiter ed. 1961)) (quoted in decision below, Pet. App. 3a).[3]

---

[3] Applying these principles, the Court has repeatedly stated that States are generally immune from suit in any court without their consent, and not, as the petitioners suggest, only immune from suit in federal court. *See, e.g., Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1837) ("No sovereign state is liable to be sued without her consent,"); *Beers v. Alabama*, 61 U.S. (20 How.) 527, 529 (1857) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent

Thus, as the principal state court case relied upon by the petitioners recognized, for over 40 years, state courts have generally concluded in a wide variety of contexts that States which are immune from suit in federal court under the eleventh amendment are also immune from such suits in state court. *See Jacoby v. Arkansas Department of Education*, 331 Ark. 508, 962 S.W.2d 773, 777 (1998) (collecting cases from eight states over a 40-year period), *petition for cert. filed*, 67 U.S.L.W. 3024 (U.S. June 24, 1998) (No. 98-4); *see also Drake v. Smith*, 390 A.2d 541, 542-44 (Me. 1978) (federal welfare laws); *Thiboutot v. State*, 405 A.2d 230, 232-37 (Me. 1979) (federal welfare laws), *aff'd on other grounds*, 448 U.S. 1 (1980); *Jackson v. State*, 544 A.2d

---

and permission * * * "); *Cunningham v. Macon & Brunswick Railroad*, 109 U.S. 446, 451 (1884) ("It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as a defendant in any court in this country without their consent * * * "); *Hans v. Louisiana*, 134 U.S. at 16 ("The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted."); *Ex parte New York*, 256 U.S. 490, 497 (1921) (eleventh amendment is "but an exemplification" of the fundamental rule of sovereign immunity that "a State cannot be sued without its consent"); *Monaco v. Mississippi*, 292 U.S. at 322-23 ("Behind the words of the constitutional provisions are postulates which limit and control. * * * There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.") (citation and footnote omitted). In short, "[f]or over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Seminole Tribe*, 517 U.S. at 67.

291, 298-99 (Me. 1988) (Rehabilitation Act), *cert. denied*, 491 U.S. 904 (1989); *Moody v. Commissioner, Department of Human Services*, 661 A.2d 156, 158-59 (Me. 1995) (federal welfare laws).[4] "This point of view is perhaps best typified" by the analysis of the Massachusetts Supreme Judicial Court. *Jacoby*, 962 S.W.2d at 777.

> The only logical interpretation of this implicit constitutional principle [that States would retain their sovereign immunity] is that it must apply regardless of the court in which the State is being sued. Any conclusion to the contrary would decimate the force of the Eleventh Amendment and demote it into nothing more than a choice of forum clause: either the State must consent to be sued in Federal court or it will be unwillingly subjected to process in its own courts. We think that the Supreme Court's Eleventh Amendment jurisprudence demonstrates a greater respect for the principle of State sovereign immunity.
>
> Although concerns for Federal-State comity – the unseemly notion of one sovereign being hauled into the courts of another – arise in many Eleventh Amendment cases, those federalism concerns are no less present in this type of case. Although here it is not a question of a State being hauled into the *courts* of another sovereign, it is a question of a State being hauled into its own courts by the *laws* of another sovereign. Moreover, those laws are alleged to require the

---

[4] *Cf. also State Department of Highways v. Dopyera*, 834 S.W.2d 50, 58 (Tex.) (federal maritime law), *cert. denied*, 506 U.S. 1014 (1992); *Ortega v. Port of Portland*, 147 Or. App. 489, 493-98, 936 P.2d 1037, 1039-42 (1997) (federal maritime law).

> payment of retroactive damage awards out of a State's coffers. If there is any area of State sovereignty which the Supreme Court is particularly hesitant to invade, it is State citizens' settled decisions about State budgetary allocations.

Morris v. Massachusetts Maritime Academy, 409 Mass. 179, 185, 565 N.E.2d 422, 426 (1991) (emphasis in original, brackets added, and citations omitted).

Indeed, state courts long ago even addressed the specific issue whether individuals could sue for past FLSA overtime in state court when they could not sue for such overtime in federal court. Although Congress expanded the coverage of the FLSA in 1966 to include for the first time some public employers, the Court subsequently held that Congress had not expressly abrogated the States' eleventh amendment immunity in the FLSA from private suits brought in federal court. *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973). Until Congress overturned this decision by making States expressly subject to suit under the FLSA (which, in turn, has largely been invalidated vis-á-vis States in cases such as *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997)), state courts addressed claims for past FLSA overtime during the period in the mid-1970's when such claims for past overtime could not be brought in federal court. The better reasoned decisions concluded that, since States were immune from FLSA damages actions in federal court under the eleventh amendment, they were also immune from such actions in state court. *See Mossman v. Donahey*, 46 Ohio St. 2d 1, 346 N.E.2d 305, 308-15 (1976) (cited in Pet. App. 21a); *Weppler v. Dade County School Board*, 311 So. 2d 409, 410 (Fla. App. 1975); *contra Clover*

Bottom Hospital & School v. Townsend, 513 S.W.2d 505 (Tenn. 1974). For present purposes, it is sufficient to note that even the asserted conflict concerning the FLSA has not previously proven intolerable.

Thus, there is nothing unusual or radical about the conclusion of the court below – the Law Court was simply continuing a long tradition of state courts relying upon the Court's eleventh amendment jurisprudence to determine whether States that are immune in federal court are also immune from suit in state court. In the last 40 years, the Court has not yet found it necessary to review that symmetrically sound conclusion.

B. The Decision Below Did Not Create An Intolerable Conflict Of An Emerging Issue Following *Seminole Tribe*.

The petitioners suggest that the Court should grant plenary review now because *Seminole Tribe* constitutes a sea change in eleventh amendment and State sovereign immunity jurisprudence, thus spawning "a myriad of like pending cases * * * with the same inevitability as the night follows the day." Petition at 5. This asserted conflict consists, however, of only one state court of last resort, *Jacoby v. Arkansas Department of Education*, 331 Ark. 508, 962 S.W.2d 773, 777 (1998), *petition for cert. filed*, 67 U.S.L.W. 3024 (U.S. June 24, 1998) (No. 98-4), and various lower courts. In light of the complexity of the issues and the likelihood of further illumination by other state courts, this is not an intolerable conflict. Under these circumstances, to argue that *Seminole Tribe* constitutes a

watershed event which has resulted in numerous conflicting lower court decisions is to seize the sword by the blade.

Following the unanimous conclusion by federal courts that under *Seminole Tribe*, individuals cannot pursue FLSA damage actions in federal court, *see, e.g., Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997), a number of lower state courts have addressed the issue of whether individuals can pursue FLSA actions in state court.[5] That actually militates against review in this Court at this time. "One factor that affects the exercise of our discretionary jurisdiction is a desire to let some complex and significant issues be considered by several courts before granting certiorari." *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 918 (1976) (Brennan, J., dissenting from denial of certiorari). Caution is particularly appropriate if, as the petitioners contend, the "questions presented here are sensitive, difficult and important." Petition at 9.

In evaluating the alleged conflict, it is important to recognize that, following *Seminole Tribe*, only two state courts of last resort have addressed the issue whether

---

[5] Although the petitioners note that some lower federal courts have suggested in *dicta* that individuals could pursue their FLSA actions in state court, *see* Petition at 13 n.8, they wisely do not claim that the Court must resolve the conflict between the holding below and this gratuitous *dicta*. In any event, these offhand comments are not the product of any careful thought or research. *See Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996) (no authority cited), *amended on petition for rehearing*, 107 F.3d 358 (6th Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997) (one opinion concurring in the judgment cited).

Congress has the power to abrogate State sovereign immunity in state court under the FLSA when it lacks the power to do so in federal court – the Maine Supreme Judicial Court and the Arkansas Supreme Court. The other decisions are generally unreported trial court and intermediate appellate court decisions that contain scant analysis, and are currently on appeal, or are subject to further review by their respective State Supreme Courts, and ultimately by this Court.[6]

Under these circumstances, the Court should not feel compelled to address this issue today. *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 407 (1995) (O'Connor, J., dissenting) ("Even when the lower courts are in clear conflict, we often defer consideration of novel

---

[6] The petitioners' list of lower court decisions is incomplete. Sovereign immunity defenses were sustained in the following FLSA cases: *Triplett v. Iowa State University*, No. CV 37547 (Iowa Dist. Ct. March 11, 1998); *Kuehl v. New Mexico Department of Public Safety*, No. SF 97-668(C) (N.M. Dist. Ct. Feb. 25, 1998); *Allen v. Fauver*, No. ESX-L-3302-94 (N.J. Super. Ct. Feb. 17, 1998); *German v. Department of Transportation*, No. 96-CV-1261 (Wis. Cir. Ct. March 8, 1997); *cf. Keller v. Dailey*, No. 97APE05-658 (Ohio App. Dec. 19, 1997) (trial court lacks jurisdiction; Court of Claims has jurisdiction over FLSA claims). Sovereign immunity defenses were rejected in the following FLSA cases: *Whittington v. State Department of Public Safety*, No. 19,065 (N.M. App. Sept. 3, 1998); *Ahern v. State*, 676 N.Y.S.2d 232 (App. Div. 1998); *Bunch v. Robinson*, 122 Md. App. 437, 712 A.2d 585 (1998); *Chambers v. Board of Regents of University of Wisconsin System*, No. 98-CV-0763 (Wis. Cir. Ct. July 16, 1998); *Hartman v. Regents of University of Colorado*, No. 96 CV 1136 (Colo. Dist. Ct. July 9, 1998); *Ribitzki v. School Board of Highlands County*, 710 So. 2d 226 (Fla. App. 1998); *Raper v. State*, No. CL 68918 (Iowa Dist. Ct. Oct. 23, 1997).

questions of law to permit further development."). "The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result." *Id.* at 408 (O'Connor, J., dissenting) (quoting Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982)).

This is particularly true in this case since most of the lower courts have not explored the salient issues in any depth. For example, the Arkansas Supreme Court in *Jacoby* was not assisted by the trial court's one page decision sustaining the State's sovereign immunity defense that contained no analysis.[7] Even in cases in which the underlying issue is important, "the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals to serve as laboratories in which the issue receives further study before it is addressed by this Court." *Brown v. Texas*, 118 S. Ct. 355, 357 (1997)

---

[7] The *Jacoby* court also contended that the State "fail[ed] to mention, much less discuss" the employees' "pivotal authority," *Hilton v. South Carolina Public Railways*, 502 U.S. 197 (1991). *See Jacoby*, 962 S.W.2d at 776 n.1. The *Jacoby* court's reliance on *Hilton* is misguided because the issue there was not Congress' *power* to abrogate state sovereign immunity, but rather Congress' *intention* to create a cause of action under the Federal Employees' Liability Act ("FELA") against a state-owned railroad, which, in turn, could be enforced in state court. *See Hilton*, 502 U.S. at 199. The Court had previously assumed that Congress did have the power under the Commerce Clause to abrogate state sovereign immunity in FELA. *See Welch v. Texas Department of Highways*, 483 U.S. 468, 475, 478 n.8 (1987) (plurality opinion). Following *Seminole Tribe*, this assumption is, of course, unfounded since the Court made plain that proper abrogation depends upon both Congress' intent and Congress' power. *Seminole Tribe*, 517 U.S. at 55.

(Stevens, J., respecting denial of certiorari) (quotation omitted).

Furthermore, "[i]t may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1945) (Frankfurter, J., respecting denial of certiorari). In this case, the Court would benefit from further exploration by the lower courts of the entire scope of State sovereign immunity, not only as "exemplif[ied]" in the eleventh amendment, *see Ex parte New York*, 256 U.S. at 497, but as further illuminated in the tenth amendment.

Although the Law Court did not find it necessary to consider the Court's tenth amendment jurisprudence, we relied upon that jurisprudence in the courts below to reinforce the conclusion that Congress lacks the authority to abrogate State sovereign immunity in state court when it acts pursuant to its Commerce Clause powers. *See* Appellee's Brief at 24, 32-34; *cf. Bennett v. Spear*, 117 S. Ct. 1154, 1163 (1997) (respondent may defend the judgment on any ground supported by the record). For example, that jurisprudence provides an easy and complete answer to the petitioners' claim that Maine is seeking "an exception to the Supremacy Clause that saves out the state law of sovereign immunity from the otherwise overriding force of a federal statute enacted by Congress pursuant to its enumerated powers." Petition at 8.

> The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]"; so the Supremacy Clause merely brings us back to the question discussed earlier,

> whether laws conscripting state officers violate state sovereign immunity and are thus not in accord with the Constitution.

Printz v. United States, 117 S. Ct. 2365, 2379 (1997) (brackets added by Court) (quoted in Appellee's Brief at 33-34).

In other words, the issue is not whether Congress had the *intention* to subject States to private FLSA damage actions in state and federal court – it most certainly did, *see* 29 U.S.C. § 216(b) – but rather whether Congress had the *power* to do so. In *Seminole Tribe*, the Court concluded that States did not surrender their immunity in the plan of the convention when they granted complete law-making authority to Congress under the Commerce Clause. *See Seminole Tribe*, 517 U.S. at 72-73. This conclusion is equally sound in state court when coupled with the backstop of the tenth amendment, in which "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X.

In short, we believe that Congress, when acting pursuant to its Commerce Clause powers, lacks the power under the tenth amendment to abrogate Maine's sovereign immunity against FLSA damage claims in state court:

> In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

New York v. United States, 505 U.S. 144, 166 (1992) (citations omitted) (quoted in Appellee's Brief at 32 and quoted in part in *Printz v. United States*, 117 S. Ct. at 2379). Thus, when a law enacted for carrying into execution the Commerce Clause violates the principle of State sovereign immunity, it is "in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.' " *Printz v. United States*, 117 S. Ct. at 2379 (quoting The Federalist No. 33, at 204 (A. Hamilton) (C. Rossiter ed. 1961)) (brackets in original).

Neither the Law Court nor the *Jacoby* court considered the Court's tenth amendment jurisprudence.[8] Even accepting *arguendo* the petitioners' contention that the "questions presented here are sensitive, difficult and important," Petition at 9, we believe that it would be appropriate to allow all aspects of this constitutional issue, including the tenth amendment, the eleventh

---

[8] If and when the Court addresses the issue whether unconsenting States can be subjected to FLSA damages actions in state court in light of the tenth amendment, a more fundamental question that could, and perhaps should, be considered is whether States can properly be subjected to the requirements of the FLSA, *i.e.*, whether *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), should be reconsidered.

amendment, and the general "background principle of state sovereign immunity," *Seminole Tribe*, 517 U.S. at 72, to percolate further in the state courts.

The petitioners' protestations notwithstanding, *see* Petition at 14 ("[t]hese jurisdictional papers are neither the time nor the place to plumb" the merits of the issues presented), the petitioners' fundamental argument is that the Court should review the decision below because it is dangerously wrong. *Cf.* Petition at 9 (decision "denies Congress *all* authority * * * ") (emphasis in original); *id.* (decision renders portions of the FLSA a "dead letter"). We strongly disagree. In response to the question posed by *Seminole Tribe* – what is the source of Congress' power to abrogate State sovereign immunity? – the petitioners offer no response.

In a similar vein, the petitioners argue that the Court should review this case because the decision below denies significant authority to Congress to pass legislation pursuant to its Article I powers that is enforceable by private parties. *See* Petition at 9. This is simply a variation on the argument that States will ignore applicable federal law if Congress does not have authority to abrogate State sovereign immunity, which the Court not only rejected, but rejected in terms that demonstrate why the Law Court properly decided this case:

> This argument wholly disregards other methods of ensuring the States' compliance with federal law: The Federal Government can bring suit in federal court against a State; an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law; and *this Court is empowered to review a question of federal law arising from a state-court decision where a State has consented to suit.*

Seminole Tribe, 517 U.S. at 71 n.14 (citations omitted and emphasis added); *see also Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) (eleventh amendment bars suit in federal court, "leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals"). In sum, there is no compelling reason at this time to review this decision.

II. THE COURT SHOULD DENY THE WRIT TO REVIEW THE PETITIONERS' PROCEDURALLY BARRED DISCRIMINATION CLAIM.

The petitioners contend that this Court should review the decision below because the Law Court sanctioned discrimination against a federal cause of action, namely, an FLSA damages action. *See* Petition at 14-17. Since the Law Court did not address this claim, and since the petitioners did not properly present this issue in state court, the Court should not consider this matter.

> With very rare exceptions, * * * we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 117 S. Ct. 1028, 1029 (1997) (*per curiam*) (citations omitted) (dismissing writ as improvidently granted).

Before this claim disappears into procedural quicksand, it is important to recognize the limited nature of the

petitioners' claim. The petitioners do not – nor could they – contend that this aspect of the decision below conflicts with *Jacoby* or any other lower court decision. Indeed, we are not aware of any FLSA case addressing a similar discrimination claim. Rather, the petitioners contend that the Court should review the decision below because it is simply wrong. "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*, § 4.17 at 193 (7th ed. 1993) (footnote omitted).

Although the Law Court expressly rejected the petitioners' claim that Maine had waived its sovereign immunity by enacting state statutes that permit state employees to sue the State in certain circumstances, *see* Pet. App. 6a-7a, one will search in vain in the Law Court's opinion for any discussion of the petitioners' federal discrimination claim. *See* Pet. App. 1a-13a.

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented here.

Adams v. Robertson, 117 S. Ct. at 1029 (citations omitted).

The petitioners did not raise any aspect of this issue in the trial court. *See* Appendix to Appellants' Brief at A34-A36. The petitioners contended on appeal to the Law Court that Maine had waived its sovereign immunity by statutorily opening its courts to numerous other state law

claims, and, therefore, that refusing to hear the petitioners' FLSA claim also constituted illegal discrimination. In addition to dispatching the arguments on the merits, Maine responded that the petitioners' new arguments on appeal were procedurally barred under well-established Maine precedent. *See* Appellee's Brief at 7-10, 31-34 (collecting cases).[9]

The Law Court did not address the procedural barrier, presumably because the premise of both the petitioners' waiver argument (which the Law Court addressed) and the discrimination argument (which the Law Court did not address) was so plainly insubstantial. The petitioners contend that state courts must entertain the petitioners' FLSA claims because Maine has "enacted several statutes whereby the State has made itself amenable to suit in the area of state employee wage claims." Pet. App. 6a; *see also* Petition at 4 n.3 (citing statutes under which allegedly "the State is subject to suit by its employees"). The Law Court concluded, however, as a matter of Maine law, that Me. Rev. Stat. Ann., tit. 26, § 664(3) (Supp. 1997), "is the only statutory provision directly relevant to the central issue on appeal – the State's amenability to suit by state employees for overtime pay." Pet. App. 6a. This conclusion doomed the petitioners' claim because section 664(3) provides that "[t]he overtime provision of this section does not apply to

---

[9] *See, e.g., Cyr v. Cyr*, 432 A.2d 793, 797 (Me. 1981) ("No principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue, even if the issue is one of constitutional law.") (citations omitted).

public employees," *id.*, who are defined as "any person[s] whose wages are paid by * * * the State." Me. Rev. Stat. Ann., tit. 26, § 663(10) (1988); *see* Pet. App. 6a-7a.

Although the petitioners challenge this interpretation of Maine law, *see* Petition at 3 n.4, 15, this Court obviously does not review that conclusion. "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Johnson v. Fankell*, 117 S. Ct. 1800, 1804 (1997) (citations omitted). In any event, the petitioners present an extremely narrow question unworthy of this Court's review – whether Maine, in fact, has enacted "analogous state statutory private party actions" that should enable the petitioners to pursue their FLSA claims in state court.[10] *See* Petition at 15.

Moreover, Maine is not discriminating against a federal cause of action. Maine has "not selectively favor[ed] state causes of action – or selectively disfavor[ed] federal

[10] The petitioners' argument is also at cross-purposes with this Court's eleventh amendment jurisprudence in which "analogous" state statutes are insufficient to result in a waiver of State sovereign immunity. "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room, for any other reasonable construction.' " *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (brackets in original and quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). The petitioners fail to appreciate that one of the fundamental attributes of State sovereign immunity is the sovereign's power to determine under what circumstances it will, and will not, consent to suit.

causes of action – in state court[.]" Petition at 16. The principal case relied upon by the petitioners, *Mondou v. New York*, 223 U.S. 1 (1912) (the *"Second Employers' Liability Case"*) (cited in Petition at 16), stands for the unremarkable "proposition that a state court must entertain a claim arising under federal law 'when *its ordinary jurisdiction* as prescribed by local law is appropriate to the occasion and is invoked in conformity with those laws.' " *Printz v. United States*, 117 S. Ct. 2365, 2370 n.1 (1997) (quoting *Second Employers' Liability Case*, 223 U.S. at 56-57) (emphasis added). Since over 20 years of decisions from the Law Court demonstrate that Maine's ordinary jurisdiction does not permit the State to be subjected to damages action in state court if it is immune in federal court, *see* Pet. App. 3a-4a (citing cases), and since Maine statutes expressly exempt the State from overtime suits,* *see* Pet. App. 6a-7a (citing statutes), Maine is not discriminating against a federal cause of action.[11]

The fundamental premise of *Testa v. Katt*, 330 U.S. 386 (1947) (cited in Petition at 16-17), and its progeny, is that "state courts cannot refuse to apply federal law[.]" *Printz v. United States*, 117 S. Ct. at 2381. This, however, does not advance the petitioners' cause since federal law in the

[11] The petitioners' reliance on *Howlett v. Rose*, 496 U.S. 356 (1990) (cited in Petition at 15), is also misplaced, since the issue in that case was "whether a state-law defense of 'sovereign immunity' is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum." 496 U.S. at 359. The issue here is precisely the opposite – should the State have available a defense in state court that was available when the action was brought in the federal forum?

form of *Seminole Tribe* precludes FLSA damages claim against States in either federal or state court. As the Law Court properly determined, if Congress lacks the authority to abrogate State sovereign immunity in federal court, then Congress lacks the authority to abrogate State sovereign immunity in state court. In sum, the Court should not review the petitioners' discrimination claim that is not only procedurally, but substantively, bankrupt.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

October 9, 1998

Respectfully submitted,

ANDREW KETTERER
Maine Attorney General

PETER J. BRANN
State Solicitor
(*Counsel of Record*)

Six State House Station
Augusta, Maine 04333
(207) 626-8800

Attorneys for Respondent

PAUL STERN
Deputy Attorney General

Of Counsel